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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1965

No. 1205

Henry Toombs, Mrs. George Taylor Douglas, Gordon G. Johnson and John L. Glenn

vs.

Ben W. Fortson, Jr., as Secretary of State of Georgia, et al.

On Appeal from the United States District Court for the Northern District of Georgia

MOTION TO AFFIRM WITH SUPPORTING BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1205

HENRY TOOMBS, MRS. GEORGE TAYLOR DOUGLAS, GORDON G. JOHNSON AND JOHN L. GLENN

vs.

BEN W. FORTSON, JR., AS SECRETARY OF STATE OF GEORGIA, ET AL.

On Appeal from the United States District Court for the Northern District of Georgia

MOTION TO AFFIRM

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Come now the Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court, and move the Court to affirm the judgment from which the appeal in the above-styled case was taken, on the ground that the questions are so unsubstantial as not to warrant further argument or consideration.

April, 1966.

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IN THE SUPREME COURT OF THE UNITED STATES

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On Appeal from the United States District Court for the Northern District of Georgia

BRIEF SUPPORTING MOTION TO AFFIRM

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE

This appeal constitutes an effort by the Appellants to have this Court review and reverse an order of the Three-Judge District Court in the Northern District of Georgia originally entered over a year ago, on April 1, 1965.

The Appellees are unable to accept either the accuracy or the completeness of Appellants' statement of the case in their Jurisdictional Statement. Of primary importance is the fact that, contrary to Appellants' assertion, the Appellees have never conceded that the present Georgia Senate and House reapportionments, either separately or collectively, violate the constitutional guidelines as set forth by this Court. The Appellees have conceded that, on April 1, 1965, the lower Federal Court made an adjudication that Georgia's apportionment plans were constitutionally deficient, which adjudication the Appellees

have accepted, because of, among other reasons: (a) a desire to terminate this litigation; (b) a reliance upon and acceptance of the remedial provisions of the lower Court's order; and (c) the desire to achieve a greater degree of stability and order in state government, particularly, the legislative branch thereof.

On March 8, 1966, Appellants filed a motion in the District Court seeking a modification and amendment of that order of the District Court, dated April 1, 1965. In less than three weeks, on March 25, 1966, the Three-Judge lower Federal Court declined to modify its April 1, 1965, order in the manner and to the extent sought by Appellants. It is that March 1966 order refusing to modify the April 1965 order by which Appellants seek a review of the earlier order.

While this litigation involves the reapportionment of the Georgia General Assembly, the beginning chapter of Georgia's reapportionment story began in 1962 with the case of *Sanders* v. *Gray,* 203 F. Supp. 158 (N.D. Ga. 1962), in which the plaintiffs attacked Georgia's "county unit system" method of elections. Plaintiffs' efforts in that proceeding were successful, *Gray v. Sanders,* 372 U. S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821 (1963). As a result of the *Gray* case, Georgia is now holding all elections on a popular vote basis.

The instant litigation was commenced in the Northern District of Georgia in April 1962. The initial decision in this litigation is reported in *Toombs v. Fortson,* 205 F. Supp. 248 (N.D. Ga. 1962), wherein the Plaintiffs sought to have the Georgia General Assembly apportioned more nearly on the basis of population. The District Court acted promptly and legislative relief was equally as prompt in forthcoming. The Georgia General Assembly convened in special session and enacted a plan of reap-

portionment for the Senate wherein the disparities as between the largest and smallest senatorial districts were reduced from a ratio of 42.5 to 1 to 1.81 to 1, and in which the theoretical minimum necessary to elect a majority of Senators was raised from 21.4% to 48.2%. Beginning with the 1963 session of the Georgia General Assembly, the State Senate has been operating under this plan. No objection was filed and no attack was made by the Appellants upon this senatorial plan of reapportionment, and as a matter of fact, no questions as to the validity or acceptability of the senatorial plan were raised until three years later, 1965, after the Georgia House of Representatives also had been reapportioned. No prior appeal has ever been taken from any order involving senatorial reapportionment in Georgia.

In 1963, another suit was filed in the Northern District of Georgia, challenging the apportionment of Georgia's congressional districts, and this Court held in *Wesberry v. Sanders*, 376 U. S. 1, 84 S. Ct. 526, 11 L. Ed. 2d 481, (1964), that Georgia's system of apportioning congressional districts was invalid and unconstitutional. Again, immediate relief was forthcoming. During the 1964 session of the Georgia General Assembly, Georgia's ten congressional districts were revamped and a new plan of apportionment was passed and adopted. No exception or objection has ever been filed in an attempt to annul this latest and presently effective plan for congressional districting in the State of Georgia.

Within a matter of hours after this Court's June 15, 1964, set of decisions in the reapportionment cases, the Plaintiffs (Appellants) filed a motion in this then quiescent case in which they sought to have the Georgia House of Representatives reapportioned in accordance with said decisions. In that motion of June 1964, the

Plaintiffs did not make any attack on the senatorial plan of apportionment and sought no relief in that regard. In response, the Court below held Georgia's 3-2-1 plan of apportionment of the House of Representatives invalid and unconstitutional and allowed the 1965 session of the Georgia Legislature to undertake to reapportion the House. The 1965 session of the Georgia General Assembly adopted a plan of reapportionment for the Georgia House of Representatives, which plan was submitted to the lower Court for its approval. The Plaintiffs (Appellants) filed various objections, but it is interesting to note that none of their objections, in any way, sought to invalidate the senatorial plan of reapportionment. This latest plan of apportionment of the House reduced the disparities existing between the largest district and the smallest district from a ratio of approximately 100 to 1 to 2.003 to 1, and increased the theoretical minimum necessary to elect a majority of the House members from approximately 22% to approximately 42%.

In its April 1, 1965 order, the Court below declined to approve the House plan in full, but did accept it as an interim measure. At the same time the Court declared the senatorial plan of reapportionment invalid and unconstitutional, although the Senate plan was also accepted as an interim apportionment measure. General midterm elections for the reapportioned House were held in 1965, and the 1966 session of the Georgia General Assembly operated under the plan of apportionment for the House and the Senate which had been approved on an interim basis by the lower Federal Court.

Notwithstanding all the figures and statistics appearing in the Appellants' Jurisdictional Statement, certain significant voids exist. For example, if the population figures used by the Appellants and appearing in the lower Court's opinion are used, it is readily apparent that in

1962 the constituencies (Fulton and DeKalb Counties) which the Appellants purport to represent in this class action, received a substantial increase in representation in the State Senate, amounting to at least 8 additional members, an increase of at least 500 per cent. In 1965 these same constituencies received an additional 30 representatives in the reapportioned House, an increase of at least 600 per cent. That is, in 1962, the Appellants' senatorial representation was increased from 2 to 10, and in 1965, Appellants' house representation was increased from 6 to 36. To assert that these achievements are not substantial or that they are insignificant does a disservice to the lower Court and to the aims expounded by Appellants.[1]

[1] Contrary to the position taken by Appellants in their Jurisdictional Statement, there has been a basic and substantial revamping of the geographical areas which comprise the various constituencies of the House and Senate, indicating the extent to which population has controlled the makeup of such constituencies, and directly reflecting the tremendous shift and change in the electorate who choose the members of the State Legislature.

Under the 1962 Senate Reapportionment Plan, the 8 largest counties (with 1,626,734 people, or 41.25% of the State total) elect 21 senators, or 40.74% of the total Senate. The 22 largest counties (with 2,251,986 people, or 57.11% of the people) have 29.546 senators, or 54.72% of the Senate membership.

Prior to the 1965 House Reapportionment Act, 103 counties with 23.53% of the total population elected a majority of the House members (103). Under the 1965 House Reapportionment Plan, these same counties have only 55.583 House members, or 27.11% of the total House membership. The 110 smallest counties with 26.66% of the total population have 62.798 representatives, or 30.63% of the House members.

Urban counties (as defined and classified by the Bureau of the Census) with 54.195% of the population elect 102 members of the House, or 49.756% of the total House membership under the 1965 House Reapportionment Act.

The 110 counties which, under the 3-2-1 formula heretofore prevailing, were the most over-represented counties in the House of Representatives, elected 122 representatives, but contained only 28.9% of the population. These *same* counties now have only 68.38 representatives, or 33.4% of the total membership, and they do *not* have 103 seats as the Appellants have contended.

The plaintiffs in Florida promptly attacked that plan in July of 1965. The District Court did not hold a hearing until November 2, 1965. A decision was rendered almost two months later, on December 23, 1965, declaring the apportionment unconstitutional because of the ratios between the districts and the theoretical minimums, but approving it as an interim measure until sixty days after the adjournment of the 1967 regular session of the Florida Legislature. No reasons were given by the Court for allowing that unusual plan to be used on an interim basis. On February 26, 1966, this Court in a per curiam decision reversed the Florida District Court, and directed that the Florida Legislature be reapportioned on constitutional standards in time for the 1966 elections.

The 1965 Florida plan represented the first substantial relief in reapportionment to the people of Florida, and was to become effective only for legislative terms beginning in 1969. In contrast, in Georgia the plaintiffs obtained relief in the Senate in 1962, and obtained relief in the House in 1965. In addition, the unique features in the Florida plan were not present in the Georgia reapportionment legislation.

It is clearly apparent, from the meticulous manner in which this Court's opinion in *Swann* v. *Adams* pointed up the history of delay and frustration of legitimate goals, that this Court felt Florida was not equitably entitled to further time. In that decision on the particular facts before it, the Court stated that:

> ". . . We find no warrant for perpetuating what all concede to be unconstitutional apportionment for another three years."

The reversal in *Swann* v. *Adams* applies to Florida and Florida alone.

The decision in *Swann* v. *Adams* obviously is not a radical departure from settled principles of law relating to remedies in constitutional law cases. An opinion in a specific case, founded on the particular and unusual circumstances of that case, is not applicable and should not be applied to cases of essentially different circumstances. *Brooks* v. *Marbury*, 11 Wheat. 78, 6 L. Ed. 423 (1825). This of course is particularly true when short per curiam decisions are rendered, because such decisions often involve only a review of factual questions concerning nothing more than the discretion of the trial court. *Newmons* v. *Lake Worth Drainage District*, 87 So. 2d 49 (Florida, 1956); 14 *Am. Jur.* "Courts", Sec. 131, 1964 Cum. Supp. A study of the history of the Florida litigation demonstrates beyond a doubt that this Court merely felt that the Three-Judge District Court in Florida had grossly abused its discretion.

A study of the history of the Georgia litigation demonstrates beyond doubt that the Three-Judge District Court in Georgia has *not* abused its discretion in allowing the Georgia General Assembly to conduct business on an interim basis.

Even if the Appellants achieved the reapportionment they now seek, their constituencies would receive, at the most, an additional one and a fraction senators, and six representatives (based on the present size of each House). Appellants' efforts to overlook the 1962 relief (where the Appellants received an additional 8 senators), and the 1965 relief (where the Appellants received an additional 30 representatives) constitutes an effort to put "blinders" on the Court.

As will be seen below, the results Appellants seek will be forthcoming. Their complaint is that the District Court did not order immediate reapportionment, necessitating a special session of the legislature and special elections.

On March 8, 1966, after the adjournment of the 1966 session of the Georgia General Assembly the Appellants filed their motion to amend or modify the order of April 1, 1965, although some eleven months had elapsed since said order had been rendered. The Court below declined to order immediate reapportionment, but reaffirmed for specific reasons stated in its opinion, its order allowing the Georgia House and Senate to function on an interim basis. The Plaintiffs now prosecute this appeal purportedly based on the order of March 25, 1966, while it is actually an effort to appeal, for the first time, from the orders of the lower Court which were originally rendered in 1962 and 1965.

ARGUMENT

A. This Decision by the District Court, Reviewing Its Previous Order, Was Completely Consistent with Its Authority, as Delineated by the Supreme Court, to Mold an Appropriate Remedy, and Hence Could Not Possibly Constitute an Abuse of Discretion.

The decision of this Court which initially recognized the role of the courts in the field of legislative apportionment also emphasized the need for flexible remedies commensurate with the anticipated particularized circumstances of individual situations, and opposed relief of a rigidly standardized variety.

> "The justiciability of the present claims being established, any relief accorded can be fashioned in the light of well-known principles of equity."
>
> *Baker* v. *Carr*, 369 U. S. 186, 250, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1957), concurring opinion by Mr. Justice Douglas.

Later, the question of remedial relief in cases involving the apportionment of legislatures was considered in the case of *Reynolds* v. *Sims*, 377 U. S. 533, 585, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964):

> ". . . Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions. It is enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a Court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. How-

ever, under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediate effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a Court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of the State election laws, and should act and rely on general equitable principles. With respect to the timing of relief, a Court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the Court's decree. As stated by Mr. Justice Douglas, concurring in *Baker* v. *Carr*, 'any relief accorded can be fashioned in the light of well-known principles of equity.' "[2]

The language quoted above demonstrates that the Federal District Courts, upon whom the task of adjudicating

---

[2] The lower Court considered that the instant case fell within the definition and the meaning of "unusual" as used in *Reynolds* v. *Sims* quoted above. Moreover, this view apparently has been shared by the Appellants:

"Since the district court, in withholding immediate relief to the appellees *in this 'unusual case'*, provided a practical 'accommodation' that would not prevent the continued adoption of constitutional amendments on specific matters of importance to the state, it is apparent that the present injunctive order applied general equitable principles adapted to local conditions and carried out both the spirit and letter of this Court's directions in *Reynolds* v. *Sims*." (Italics added) See page 20 of the Motion to Affirm and Brief filed by the Appellees (Appellants here) in conjunction with the prior appearance of this case in this Court at the October 1964 Term, Case No. 300.

individual apportionment cases falls, should always attempt to shape the remedy to the circumstances of the particular situation, and impending elections are specifically mentioned as such a significant special circumstance as would make the postponement of full implementation of the Court's decision equitably desirable. The singling out of the election example, when seen in the full context of the above quoted decision, does not prevent the District Courts from considering as the opinion directs, "a variety of local conditions" in fashioning relief. Nothing in *Reynolds* v. *Sims* suggests that the District Courts have less than the normal remedial discretion exercised by them in other areas of adjudication involving claims which are equally compelling. In fact, the opposite is true.

There have been no subsequent directions forthcoming from this Court on the question of modes of relief, and the Court in a series of cases subsequent to *Reynolds* v. *Sims, supra,* stated that for the present, no further comments on the subject would be forthcoming. *YMCA* v. *Lomenzo* 377 U. S. 633, 655, 84 S. Ct. 1418, 12 L. Ed. 2d 568 (1964); *Maryland Committee* v. *Tawes,* 377 U. S. 656, 675-676, 84 S. Ct. 1442, 12 L. Ed. 2d 595 (1964); *Lucas* v. *The Forty-Seventh General Assembly,* 377 U. S. 713, 739, 84 S. Ct. 1472, 12 L. Ed. 2d 632 (1964); *Roman* v. *Sincock,* 377 U. S. 695, 710-712, 84 S. Ct. 1462, 12 L. Ed. 2d 620 (1964). There were, however, indications in these decisions that the question of whether to delay effectuation of full apportionment in order to prevent disruption of the election processes was a discretionary determination to be made by the District Court. The fact that within the last few weeks this Court has affirmed, in per curiam fashion, a lower Court decision postponing full congressional redistricting until after this year's Fall

election indicates that, barring flagrant action by a Court contrary to the constitutional principles involved, exercise of discretion by District Courts on remedial questions will stand as a final determination. *Drum* v. *Seawell, et al.*, — U.S. —, 34 U. S. L. W. 3339 (1966).

Although the lower Courts have not as yet been given specific directions for their adjudication of appropriate relief in reapportionment cases, prior expressions of this Court in other areas, many of them having aspects analogous to the problems of legislative apportionment, are applicable in this area.

In a decision involving other rights under the Equal Protection Clause of the Federal Constitution, it was stated that the implementation of the ruling could best be accomplished by the Courts closest to the particular local problems involved:

> "Because of their proximity to local conditions and the possible need for further hearings, the Courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to these Courts."
>
> *Brown* v. *Board of Education of Topeka*, 349 U. S. 294, 299, 75 S. Ct. 753, 99 L. Ed. 1082 (1954).

Similarly, the proper relief in apportionment cases is greatly determined by practical consideration of local or particular conditions, and these lower Court decisions in such cases carry an extra presumption of validity beyond the normal assumption as to the soundness of any exercise by a District Court of its equitable discretion. *Associated Press* v. *United States*, 326 U. S. 1, 27, 65 S. Ct. 1416, 89 L. Ed. 2013 (1944).

In molding appropriate relief in a given case, the Dis-

trict Courts may balance the interests of the parties involved, and if one of the parties happens to be either the federal or local government, the Court may give particular attention to its problems in fashioning an applicable remedy. *Brown* v. *Board of Education of Topeka, supra*, at 300; *Brotherhood of Locomotive Engineers* v. *Missouri-Kansas-Texas Railroad*, 363 U. S. 528, 531-532, 80 S. Ct. 1326, 4 L. Ed. 2d 1379 (1960); *Georgia* v. *Tennessee Copper Company*, 206 U. S. 230, 237-239, 27 S. Ct. 618, 51 L. Ed. 1038 (1907); *Central Kentucky Natural Gas Co.* v. *Railroad Com.*, 290 U. S. 264, 271, 54 S. Ct. 154, 78 L. Ed. 307 (1933):

> "In fashioning and effectuating the decrees, the Courts will be guided by equitable principles. Traditionally equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs."
>
> *Brown* v. *Board of Education of Topeka, supra.*

Courts exercising their equity powers in molding relief can recognize the necessity of granting a reasonable time in which to comply with the decree so as to avoid hardship or injury to the various interests involved. *Central Kentucky Gas Co.* v. *Railroad Com., supra; Brown* v. *Board of Education of Topeka, supra; Scranton v. Drew*, 379 U. S. 40, 41-42, 85 S. Ct. 207, 13 L. Ed. 2d 107 (1964).

> "While giving weight to these public and private considerations, the Courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954 ruling. Once such a start has been made, the Courts may find that additional time is necessary to carry out the ruling in an effective manner."
>
> *Brown v. Board of Education of Topeka, supra.*

Georgia has made its start, a good start, and the District Court found that additional time is necessary to carry it out in an effective manner.

In light of the above analysis of the scope of the District Court's discretion in fashioning remedies in apportionment cases, it is unreasonable for Appellants to say that this District Court has, in its decision reviewing the relief granted them and in further modifying in their favor an order already favorable to their interests, so grossly abused its broad discretionary powers as to require reversal by this Court. *Wood* v. *United States*, 16 U. S. 342, 365, 10 L. Ed. 987 (1842); *Burns* v. *United States*, 287 U. S. 216, 222-223, 53 S. Ct. 144, 77 L. Ed. 266 (1932).[3]

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[3] Similar views to those expressed herein have been previously urged by Appellees [Appellants here] in their Motion to Affirm and Brief of the Appellees in Support of Motion, filed in the previous appearance of this case in this Court. See pages 5, 6, 7 and 8 of said Motion to Affirm and Brief, wherein Appellants refer to and quote from *Brown* v. *Board of Education*, 349 U. S. at 299-300, 75 S. Ct. at 756, and then state on page 8:

"It is an underlying assumption of Appellants [Appellees here], in their Jurisdictional Statement, that when the District Court has ordered reapportionment by a date fixed in accordance with *Reynolds*, it has exhausted its equity power and can take no further action in formulating its decree to protect the rights of parties or the public interest from irreparable injury during the interim. *We submit that any such assumption is contrary to both the letter and the spirit of the Reynolds decision. The traditional flexibility and capacity of a court of equity are not so restricted*, particularly when vindication of the admitted constitutional rights of a majority of the citizens of the state must continue to be postponed." (Italics and matter in brackets added.)

B. **The Decision of the Court in Swann v. Adams Is Not a Mandate to the States Requiring Legislative Reapportionment No Later Than 1966.**

This Court's recent per curiam decision in *Swann* v. *Adams* — U. S. —, 34 U. S. L. W. 3291 (1966), should not be misinterpreted as a new and inflexible rule of law for reapportionment cases generally. The actions of both the Florida Legislature and the Florida Three-Judge District Court are in no way similar to that of Georgia, and the equitable factors requiring the Supreme Court to order immediate reapportionment in Florida are obviously not present in this case. The first reapportionment decision in Florida was handed down on July 23, 1962. *Sobel* v. *Adams*, 208 F. Supp. 316 (D.C. Fla. 1962). At that time in Florida the ratio of the largest to the smallest House district was over 100 to 1. After the court decision, the Florida Legislature adopted a proposed constitutional amendment for submission to the people of Florida in November of 1962. As the Georgia District Court pointed out in its March 25, 1966 decision, that plan represented only a negligible improvement. The plan guaranteed each county in Florida at least one representative. The theoretical minimum for control of the House would have been raised only from 15% to 27%. That proposed plan was approved as constitutional by the District Court of Florida. *Sobel* v. *Adams, supra.* The people of Florida rejected that proposed plan in the November 1962 general election, and their legislators that year were elected under the old system. As of that date, Georgia had already substantially reapportioned its Senate and had held a special election under its reapportionment plan. Furthermore, the Appellants in this case apparently accepted this plan as constitutional. They did not appeal.

The Florida Legislature convened in a special session in November of 1962 to reapportion, but was unsuccessful. At a later special session in January of 1963, a statutory reapportionment plan was approved. In that plan, the theoretical minimum to control the House was 27.4%, and the theoretical minimum for the State Senate was 14%. That Act was upheld as an acceptable final reapportionment plan in *Sobel* v. *Adams*, 214 F. Supp. 811 (D.C. Fla. 1963). The plaintiffs in that case promptly appealed to this Court.

On June 15, 1964, *Reynolds* v. *Sims* and the related cases were decided by the Court. *Sobel* v. *Adams* was reversed on June 22, 1964, and remanded for further proceedings consistent with *Reynolds* v. *Sims*. *Swann* v. *Adams*, 378 U. S. 553, 84 S. Ct. 1904, 12 L. Ed. 2d 506 (1964). The Florida plaintiffs then moved to enjoin the placing on the November general election ballot of a proposed constitutional amendment embodying the same 1963 legislative apportionment scheme only recently invalidated by this Court. The District Court declined to grant the injunction on October 21, 1964, but the amendment was rejected by the Florida voters on November 3, 1964. No action was taken whatsoever on the Florida plaintiffs' motion to require valid reapportionment until January 8, 1965. At that time the Florida District Court entered an order deferring further action to give the Florida Legislature an opportunity to reapportion by July 1, 1965. An unsuccessful reapportionment session of the Florida Legislature was held in June of 1965. Another was then convened, and a reapportionment plan was enacted on June 29, 1965. Under this supposedly final legislation, the ratio of House districts in Florida varied by more than 4 to 1, and of Senate districts by more than 2 to 1. Elections under that plan were to be held as part

of the regular 1966 elections. In addition to the 4 to 1 ratio in the House districts, there were several unique features in the Florida plan. First, certain Senators whose constituencies were completely abolished by the reapportionment plan were nevertheless permitted to serve until November 1968. Even the District Court rejected that provision. *Swann* v. *Adams*, — F. Supp. — (D.C. Fla. 1965). Other Senators, whose districts had been altered or contracted, were also permitted to serve until November 1968, regardless of the fact that in some cases they had been elected by only a small fraction of the people they now purported to represent. One of those Senators had been elected by only 7% of the population of his new district. These interesting variations on the now discredited theme of virtual representation were not rejected by the Florida District Court. The plan further provided that where several Senators were assigned to a district of two or more counties, no two Senators could reside in the same county until each county in the district had a Senator. That was an effort to insure that each county had a Senator, regardless of its population. As to the larger counties having more than one Senator, only Dade County, containing the City of Miami, was subdistricted, and that subdistricting followed the lines of two congressional districts which had been previously declared unconstitutionally imbalanced in other litigation in the same Court. Those last two provisions were not rejected by the District Court in Florida. It was clear to this Court in *Swann* v. *Adams* that Florida, after numerous special sessions and court cases, and pronouncements of this Court, still sought to retain control of the state legislative processes in the rural counties of the State.

C. The Recent Case of Drum v. Seawell, Shows That Swann v. Adams Is Not a New Rule of Law Requiring Immediate Reapportionment.

In *Drum* v. *Seawell*, — U. S. —, 34 U. S. L. W. 3339, plaintiffs originally brought suit in 1965 to compel both legislative reapportionment and congressional redistricting in North Carolina. On November 30, 1965, a Three-Judge District Court entered an interlocutory order holding that the legislative apportionment and the congressional districting were unconstitutional. The General Assembly of North Carolina then met in special session and reapportioned the State Legislature and redistricted the congressional districts. The plaintiffs attacked that reapportionment legislation, and the District Court, after carefully examining the matter, held that the legislative reapportionment met constitutional standards, but that the congressional redistricting did not. The District Court noted in its opinion, *Drum* v. *Seawell*, — F. Supp. — (D.C. N.C. 1966), rendered on February 18, 1966, that pursuant to *Reynolds* v. *Sims*, stricter adherence to equality of population between districts is more required in congressional than in State legislative representation. The District Court held that the congressional districting was unconstitutional, but nevertheless, recognizing "the good faith effort of the Legislature to bridge the tremendous gulf which existed between the status quo and the constitutional requirements," permitted the congressional elections of 1966 to take place under the invalid congressional redistricting law. That of course meant that congressional districts would not be fully reapportioned prior to the January 1969 session of the United States Congress. After this Court's decision in *Swann* v. *Adams*, the plaintiffs in the North Carolina case made a motion for rehearing before the Three-Judge District

Court, based upon the decision in *Swann* v. *Adams*. As was pointed out on page 4 of the Appellees' Motion to Affirm in *Drum* v. *Seawell*, the plaintiffs grounded their petition for rehearing and their appeal to the United States Supreme Court solely upon the decision in *Swann* v. *Adams*. On April 4, 1966, this Court affirmed the North Carolina District Court's judgment in *Drum* v. *Seawell*.

The affirmance in the *Drum* case shows conclusively that *Swann* v. *Adams* laid down no unalterable rule of law that legislative reapportionment or congressional redistricting must be accomplished by 1966. There is little distinction in the legal principles involved in legislative reapportionment and congressional districting insofar as relief is concerned. The goal to be achieved, based upon the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, is one man — one vote. *Wesberry* v. *Sanders, supra*; *Reynolds* v. *Sims, supra*. In *Drum* v. *Seawell*, although it was clear that enough time was physically available for the North Carolina General Assembly to redistrict its congressional districts again, the District Court, relying on general equitable principles, allowed a somewhat unconstitutional plan to be used on an interim basis. The responsible performance of the State of North Carolina warranted such an order. The *Drum* v. *Seawell* case refutes Appellants' statement on page 12 of their Jurisdictional Statement that "Neither considerations of legislative convenience nor of judicial deference justify the postponement of valid reapportionment where the eminence of forthcoming elections does not make compliance with the constitutional standard impossible." While it was physically possible for North Carolina to again go into special session and redistrict, the District Court, in recognization of the equit-

able considerations involved, did not require them to do so. This Court affirmed that decision.

The State of Georgia, like North Carolina, has demonstrated its responsible performance, and the decision of the Georgia District Court should also be affirmed.

D. The Record in This Case Shows That Both the Three-Judge District Court and the Georgia General Assembly Have Acted Responsibly to Bring About a Fair, Effective State Legislature to Act in the Interest of All Georgians.

The Statement of the Case previously set forth shows the responsible manner in which Georgia has handled legislative reapportionment. The contrasts between the Georgia situation and the Florida situation are striking, and the Three-Judge District Court in Georgia, of course, recognized the dissimilarities. From the very outset, the Georgia case has been characterized by expeditious handling by both the Three-Judge District Court and the General Assembly. As pointed out in the decision of April 1, 1965, *Toombs* v. *Fortson,* 241 F. Supp. 65 (D.C. Ga. 1965), "The fault of both the Senate and House plans, if any, lies not in a lack of rationality, but in departures from the average to a prohibited degree." The District Court did not hold, in 1965, that the House and Senate plans were unconstitutional because of "glaring disparities" but rather held that while substantial progress had been made, reapportionment fell somewhat short of the one man—one vote standard. The Court allowed the reapportionment plans to be used on an interim basis because:

> "This will afford an opportunity to the Legislature as now approved for the remainder of this term to observe the workings of the body in which for the first time there will be multi-county representatives and increased representation for many counties. Such study may add materially to the skill brought to bear in the following session of the General Assembly in finally bringing the membership within constitutionally acceptable standards. It will, among other things, afford

an opportunity to test the joinder of counties as to the various factors of compatibility heretofore referred to, and it will afford an opportunity to consider the relative merits of county-wide versus district representation in multi-district counties. *It may, in sum, permit a much more objective and more scientific solution to the difficult problem that remains to be resolved.*" (Italics added.)

Toombs v. *Fortson, supra at 71.*

In contrast to the Florida District Court's decision in *Swann* v. *Adams,* the Three-Judge District Court in Georgia felt that certain factors warranted an interim period, and set forth these factors. The Court recognized the interests of both plaintiffs and defendants in achieving an objective and scientifically sound apportionment of the Legislature which could function in the best interest of all. The Court also recognized that the legislative process is a complex and involved one and that Georgia was undecided as to whether heavily populated counties should have multiple representation or should be divided into districts. An interim period was allowed so that new legislators from urban districts could become proficient in the art of legislation, and so that the Legislature and the State could study its political subdivisions, balance the interests of those in different areas, and enact final legislation which would be in the best interest of the people. The lower Court did not subvert the one man —one vote principal to reasons of political convenience; rather it allowed an interim period to further the goal of a properly apportioned Legislature. These Appellants failed to appeal from the order of the Court of April 1, 1965, and the Appellees naturally assumed that the pro-

visions of the order of the District Court allowing time for readjustment were acceptable to them.[4]

The only question before the Court in this appeal from the District Court's opinion and order of March 25, 1966, is whether or not the District Court abused its discretion in only partially modifying its order of April 1, 1965. The Court did modify its order to provide that reapportionment legislation must be enacted by May 1, 1967, rather than by May 1, 1968. This date was moved up to provide time for the District Court to pass on the plan or system which will be adopted, and to allow a timely appeal from such order as may be entered, if an appeal is necessary. The Court below pointed out that to further modify the order would require another special election for one-

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[4] The derogatorily labeled "distorted philosophy" referred to and complained of on page 7 of Appellants' Jurisdictional Statement, seems to be startlingly similar to a theory propounded by the Appellants at the June 19, 1964 hearing before the lower Court, and which was then referred to and described by Appellant's counsel by the approving label of "provisional reapportionment". That hearing was conducted after the June 15, 1964 reapportionment decisions and the result, which the Appellants now so stoutly condemn, was in fact suggested by the Appellants; i.e., the use of the Georgia Senate plan as the basis for the reapportionment of the Georgia House. See transcript of the proceedings of June 19, 1964, pages 26 and 27. As a matter of fact, Appellants' counsel went even further and recognized the acceptability of an interim period with full and complete reapportionment to come, as described by their counsel, "later" (and not "next year" as one might have expected). See page 45. At page 99 of the same June 19, 1964 transcript, counsel for Appellants, in referring to the reapportioned Senate, stated as follows:

> "We feel the results we have achieved two years ago and as the State itself admitted were *most wise* and *most sound* and they were done with proper *expedition*." [Italics added.]

Thus, it seems clear that any use of the senatorial reapportionment plan as a guide for the reapportionment of the Georgia House, on an interim basis, has not only received the tacit but express approval of these Appellants.

year Senate and House terms, and that such requirements were not indicated under the facts and circumstances of the case. In its opinion of March 25, 1966, the Court, after comparing the Florida and Georgia litigation and legislation, held that:

> "This court invoked its equity power in accepting the Georgia plan to the extent deemed necessary to preserve and strengthen the Legislative branch of the Georgia government with only a slight withholding of relief to plaintiffs. We deemed this discretionary measure to be a wise and proper course in the interest of plaintiffs and the State. This is still our view. We do not believe to now so hold will be an abuse of discretion in view of the difference in the facts of this litigation and the Florida apportionment litigation."

The District Court in Georgia did not abuse its discretion.

The Appellants on pages 18 and 19 of their Jurisdictional Statement have set forth reasons which they feel require immediate and further reapportionment of the Georgia General Assembly. They maintain that because the new Governor is to be elected for a four-year term in November of 1966 that the "issues and platforms of candidates will necessarily have to be related to the composition of the malapportioned Assembly." Of course, State-wide officers, such as the Governor of Georgia, are elected on a straight population basis, and it is difficult to understand how the gubernatorial campaign could possibly be related to the composition of the presently apportioned General Assembly. As both Houses of the General Assembly have already been reapportioned once, there would be only a slight additional number of seats given to districts under any further apportionment. There would be absolutely no shift of any political significance

in the Georgia Senate, as the statistics show that the questionable ratio between Senate districts is caused by a few isolated imbalanced urban areas. That is to say, the composition of the State Senate would not shift on any basis such as from a rural composition to an urban one. Therefore, it is difficult to see what relation, if any, State-wide campaigns or prospective legislative programs have to the issues in this case.

E. The Doctrine of Law of the Case Is Applicable to This Case.

The decision of the District Court should be affirmed for the additional reason that the Court's order of April 1, 1965, became the law of the case by virtue of the Appellants' failure to appeal. The doctrine of law of the case, in the federal system, applies both to decisions made by the trial court and by the appellate courts. 1 B Moore's Federal Practice, § 404(1), p. 402. While it is true that the doctrine of law of the case does not have the effect of res judicata, it should be applied unless it can be shown that the party opposing a motion seeking a modification of an order has not relied reasonably upon the prior order of the court. The doctrine of law of the case in the federal system was defined by this Court in *Southern Railway Company* v. *Cliff*, 260 U. S. 316, 319, 43 S. Ct. 126, 67 L. Ed. 283 (1922), as follows:

> "The prior ruling may have been followed as the law of the case, but there is a difference between such adherence and res judicata. One directs discretion; the other supersedes it and compels judgment."

The facts and law in the case of *Toombs* v. *Fortson* clearly demonstrated to the Court below that its prior decision should stand. The slight modification of the April 1965 decision, in the order appealed from in this case, actually represents a reaffirmation of the earlier ruling. The April 1965 order specified as its goal a full and proper reapportionment for the 1968 elections. By modifying its order to provide for the enacting of the final plan by May 1, 1967, well in advance of, and to apply to the 1968 elections, the Court below insured the objective of its April 1, 1965 decision. This is the law of this case.

Georgia has been involved in reapportionment since 1962. The General Assembly of Georgia has acted in good faith to reapportion itself. The District Court noted that substantial progress has been made. It would serve no useful purpose to require immediate reapportionment at this time. This is an election year in Georgia not only for members of the General Assembly, but for State-wide officers as well. The political parties will shortly accept notices of candidacy for primaries in September. Final relief in the area of legislative apportionment has been guaranteed by the lower Court's decision of April 1965, and that guarantee was reaffirmed by its decision of March 1966. In *Western Fire Insurance Company* v. *University City*, 124 F. 2d 698, 699 (8th Cir. 1942), the Court stated:

> "True, the doctrine of the law of the case is a rule of practice and not a limitation of power, yet it will not, except for very cogent reasons, be departed from."

No such cogent reasons were shown in the motion filed by the Plaintiffs. This court, in *Reynolds* v. *Sims*, left the District Courts great latitude in formulating appropriate relief. The Court below has ordered relief which is fair to the Plaintiffs. If the Plaintiffs are aggrieved now, they were aggrieved when the District Court's decision was handed down in 1965, and an appeal should have been taken at that time. To strike down the District Court's plan of relief at this time would thoroughly disrupt the regularly-scheduled election processes of the State of Georgia. The motion below showed no compelling reason why the doctrine of the law of the case should not be applied. The doctrine of law of the case, "Like stare decisis, should be applied that substantial justice is done in the cases that are being decided." *Moore and Oglebay*, "The Supreme Court, Stare Decisis and Law of

the Land" (1943) 21 Tex. L. R. 514, 553. The Appellees have relied upon the lower Court's decision of April 1, 1965. The machinery for the election of a new General Assembly has already been set in motion. Registrars and local political subdivisions are preparing electors lists for the upcoming primaries and elections. Individual potential candidates are studying their districts, assessing their chances, obtaining necessary financial support, all looking to the 1966 elections. To paraphrase the Appellants, the "issues and platforms of candidates will necessarily have to be related to" existing apportionment. As was stated in *White* v. *Higgins*, 116 F. 2d 312, 317 (1st Cir. 1940):

> "Though the power exists to reopen the points of law already decided, it is a power which will necessarily be exercised sparingly, and only in a clear instance of previous error, to prevent a manifest injustice."

The District Court's order of April 1, 1965, and the subsequent partial modification of March 25, 1966, have brought about substantial justice, not a "manifest injustice." In fact, it is the other way. It would be "manifest injustice" to disrupt a court order on which reliance has been placed for over a year, with no appeal pending.

CONCLUSION

Well established principles of equity call for the affirmance of the decision of the Court below. The order of the District Court attacked by the Appellants was rendered over one year ago. If an appeal had been taken from that order in a timely manner this Court would have, in all probability, rendered a decision prior to the 1966 session of the General Assembly. Had that happened, the General Assembly, in regular session, would have been able to consider any matters presented by such a decision.

At this time, however, several harsh alternatives will be presented to the State of Georgia if this Court rules that the District Court abused its discretion. Another special session of the Legislature will have to be called, and this session would conflict with the election campaigns of legislators, as well as all other State and local officers, to be held in November of 1966. Such a special session would also place an unnecessary additional financial burden on the taxpayers. The only other alternative would be reapportionment by the District Court.

The Appellees have relied upon the order of the District Court of April 1, 1965, for a period of over one year. Contrary to a statement in the Appellants' Jurisdictional Statement, the Appellees have never conceded the unconstitutionality of either the Senate or the House reapportionment plans. While both of these plans have been found by the District Court to be constitutionally deficient, the Appellees, seeking to end litigation, chose not to appeal. In order to attain some degree of stability and certainty in state government, the State of Georgia waived its right to appeal in 1965 and thus has accepted the adjudication of the issues by the Federal District

Court. By a belated motion, appellants have sought to reopen the litigation.

In order to achieve the best reapportionment plan, additional time for study will be a significant aid in obtaining the ends desired. The District Court recognized this in its decision of March 25, 1966, by ordering that final reapportionment legislation be enacted by May 1, 1967, so that the plan may be studied and challenged if necessary prior to the regular 1968 elections. Surely a natural and orderly transition is more to be desired, and is more consonant with principles of equity, than any immediate mathematical solution as called for in this Appeal.

The Appellees and the Georgia Legislature have met in good faith every test which has been presented to them, and have achieved a degree of equality in representation perhaps not yet achieved by any other state in the Union. The only issue before this Court in this Appeal is whether or not the Three-Judge Federal District Court in its decision of March 25, 1966, abused its discretion in only partially modifying its order of April 1, 1965. The Appellees submit that not only was that discretion not abused, but that it was in fact well exercised. It is respectfully submitted that appellees' Motion to Affirm should be granted.

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PROOF OF SERVICE

I, E. FREEMAN LEVERETT, attorney for Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of April, 1966, I served copies of the foregoing Motion to Affirm with Supporting Brief on the Appellants herein named, by mailing copies thereof in duly addressed envelopes, with postage prepaid to Francis Shackelford, Edward S. White, Emmet J. Bondurant, II, Israel Katz, and Hamilton Lokey, attorneys of record for said Appellants.

E. FREEMAN LEVERETT

END